

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Respondent

and

SISTERS OF CHARITY HOSPITAL OF
BUFFALO, NEW YORK, ST. JOSEPH
CAMPUS,

Charging Party

Case Nos. 03-CB-154807/03-CB-162455

**CHARGING PARTY'S BRIEF IN SUPPORT OF
CROSS-EXCEPTIONS TO DECISION OF
ADMINISTRATIVE LAW JUDGE DONNA DAWSON**

Larry G. Hall
FORDHARRISON LLP
55 East Monroe Street
Suite 2900
Chicago, IL 60603

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NOW COMES SISTERS OF CHARITY HOSPITAL OF BUFFALO, NEW YORK, ST. JOSEPH CAMPUS (hereinafter referred to as "St. Joseph Campus," "SJC" or the "Hospital"), by and through its attorney Larry Hall of FordHarrison LLP and, pursuant to Section 102.46 of the NLRB's Rules and Regulations, Series 8, as amended, hereby files its Brief in Support of Its Cross-Exceptions.¹

INTRODUCTION

After a two day hearing, Administrative Law Judge ("ALJ" or "Judge") Dawson found that the Communication Workers of America (the "CWA" or the "Union") violated Section 8(b)(3) of the Act by failing to meet and bargain at reasonable times with Sisters of Charity Hospital of Buffalo, New York, St. Joseph Campus. In doing do, the ALJ relied upon the overall conduct and

¹ References to the ALJ's Decision shall be designated as (ALJ ____:____) showing the page number first followed by the line numbers; to the Respondent's Brief as (R.B. ____); to the transcript as (Tr. ____); to the General Counsel's Exhibits as (G.C. Ex. ____); to the Charging Party's Exhibits as (C.P. Ex. ____); and to the Respondent's Exhibits as R. Ex. ____).

unavailability of the Union's chief negotiator, Erin Bowie. When Bowie's conduct is viewed in its entirety, both at and away from the bargaining table, it is clear that the Union, through Bowie, failed and refused to meet and bargain at reasonable times.

At hearing, the General Counsel and Charging Party presented evidence, through witness Margaret Donofrio, a Nurse Manager at Kenmore Mercy Hospital, that CWA Local 1133 Vice President Kathy Kelly stated that the CWA's strategy was to delay the negotiations because the Union wanted to close down the city. (Tr. 95,172)

Kelly's statements, while not necessary to a finding that the Union unlawfully failed and refused to meet and bargain at reasonable times, provides further context to the Union's refusal to schedule more meetings in the St. Joseph Campus RN negotiations.

**A. BACKGROUND FACTS
(Cross-Exceptions 1-11)**

1. Catholic Health System

Sisters of Charity Hospital of Buffalo, New York consists of two acute-care hospitals. One of these hospitals, referred to as Sisters, or Sisters of Charity, is located in northern Buffalo, and is not involved in this case. The other Sisters of Charity hospital is referred to as St. Joseph's or the St. Joseph Campus and is located in Cheektowaga, New York, a suburb of Buffalo. (ALJD 2:11-15; Tr. 35, 174-175) The St. Joseph Campus is the hospital involved in this proceeding.

The two Sisters of Charity Hospitals are owned by Catholic Health System (hereinafter "Catholic Health" or "CHS"). CHS owns a number of health care facilities in the Buffalo metropolitan area, including five acute-care hospitals. The five hospitals are Mercy Hospital, Kenmore Mercy Hospital, Mount St. Mary's Hospital and the two Sisters of Charity hospitals. (ALJD 2:12-15; Tr. 34-35)

Employees at four of these hospitals are represented by various Unions. Sisters of Charity Hospital in Buffalo is the only unrepresented hospital. At the four represented hospitals, employees are represented by four different Unions in 11 different bargaining units. (Tr. 35; C.P. Ex. 1)

The CWA represents the following bargaining units at three of the CHS owned hospitals:

<u>Hospital</u>	<u>Union</u>	<u>Bargaining Unit</u>
Sisters of Charity, St. Joseph Campus	CWA	Registered Nurses
Sisters of Charity, St. Joseph Campus	CWA	Service
Mercy	CWA	Registered Nurses
Mercy	CWA	Service, Technical, Clerical
Kenmore Mercy	CWA	Registered Nurses
Kenmore Mercy	CWA	Technical

(C.P. Ex. 1)

Thus, the CWA represents two bargaining units each at St. Joseph Campus, Mercy and Kenmore Mercy. (ALJD 2:14-17; Tr. 36) While there are Local Unions at each of these hospitals, the only parties to the various collective bargaining agreements are the respective hospital and the CWA. (Tr. 228) The respective Local Union is not a party to any of these contracts. (G.C. Ex. 2, at p. 4) CWA Local 1168 is chartered for the two units at St. Joseph Campus and CWA Local 1133 is at both Mercy and Kenmore Mercy. (Tr. 36)²

2. St. Joseph Campus

St. Joseph Campus has three bargaining units. The technical employees are represented by the SEIU and covered by a contract which expires May 31, 2017. The service employees are represented by the CWA and its Local 1168. The service employee contract was negotiated in the

² Local 1133 represents employees only in those bargaining units at Mercy and Kenmore Mercy hospitals. (Tr. 160, 249-250) While Local 1168 has the two bargaining units at St. Joseph Campus, Local 1168 also represents employees who work at the Kaleida Health System. (Tr. 251) Kaleida is the other major health care provider in the Buffalo area and is Catholic Health's major competitor. (Tr. 173) The officers of Local 1168 are employed by, and work at, Kaleida. (Tr. 252) As Erin Bowie testified, the primary membership and the primary responsibilities of Local 1168 are at Kaleida, not St. Joseph Campus. (Tr. 251)

summer of 2014 and is in effect for four years, expiring August 15, 2018. (Tr. 107, 135; C.P. Ex. 1)

The Registered Nurses (“RN”) at St. Joseph Campus are also represented by the CWA and its Local 1168. The RN unit is comprised of approximately 200 Registered Nurses. (ALJD 2:19-26; Tr. 185) The RN contract was last negotiated in 2012. It was a three year contract and expired August 31, 2015. (ALJD 2:28-30)

The 2012 RN contract negotiation at St. Joseph Campus resulted in a contract that was described by the Union as concessionary because it did not contain many economic benefits that existed in the prior contract. Thus, in the 2012 negotiations, the parties agreed to eliminate daily overtime, supplemental pay, seniority based wage step increases and other one business day after the contract expired. (ALJD 2:38-40; Tr. 97, 186, 325-326)

In 2015, one of the CWA’s primary goals in the St. Joseph Campus RN negotiations was to recoup all of the economic concessions it had agreed to give up in the 2012 negotiations. (Tr. 325-326) The CWA also knew that the hospital would not agree to restore those economic items. Consequently, the CWA knew, before the RN contract renewal negotiations had even commenced, that the 2015 RN contract negotiations at St. Joseph Campus would be difficult. (Tr. 326)

For the past five years, the chief spokesperson for all of the Catholic Health hospitals has been Elisha Tomasello. Tomasello is employed by Catholic Health as Vice President HR Services. (Tr. 33-36) As VP, HR Services, Tomasello manages six departments, one of which is labor relations. In the labor relations department, Tomasello is responsible for negotiating contracts in all 13 different bargaining units, including Kenmore Mercy and St. Joseph Campus, handling grievances, conducting arbitrations and providing advice to each of the Catholic Health care facilities. (Tr. 35-36) During this same time period, with one exception, the chief spokesperson

for the CWA has been Erin Bowie. Bowie is a Staff Representative for District 1 of the CWA. (Tr. 38, 183-84, 269)³ As a Staff Representative, Bowie negotiates contracts, administers the grievance procedure at Step 3 or beyond, assists counsel in arbitration and occasionally assists in organizing campaigns. (Tr. 184) Negotiating contracts on behalf of the CWA members is a primary function of not only Bowie but also District 1 of the CWA. (Tr. 274)

As described above, the CWA represents six different bargaining units at three of the Catholic Health owned hospitals, including St. Joseph Campus and Kenmore Mercy. (ALJD 2:12-17; Tr. 36; C.P. Ex. 1) During the past five years, each of these six bargaining units has completed a full negotiation resulting in a ratified contract and four of these six bargaining units are now currently in the process of negotiating a renewal contract.

Tomasello has been the chief spokesperson for the CHS owned hospitals for the past five years and in the four negotiations that are now in process, including the St. Joseph Campus RN negotiations and the Kenmore Mercy Technical negotiations. (ALJD 2:32-34; Tr. 33-36) Bowie was the chief spokesperson for the CWA and is the chief spokesperson in the four negotiations that are ongoing including both the RN negotiations at St. Joseph Campus and the Technical employee negotiations at Kenmore Mercy. (ALJD 2:32-34; Tr. 38, 276-77)

3. Kenmore Mercy Hospital

Kenmore Mercy Hospital is one of the five hospitals in the Buffalo, New York area owned by Catholic Health.

³ The CWA's structure divides the country into geographic territories, known as a District. District 1 includes the New England states, as well as New York and New Jersey. District 1 has five offices, with each office covering a portion of that territory. Buffalo is one of these five offices. (Tr. 271-72) Bowie works out of the Buffalo office and is assigned to Upstate New York. In District 1 there are 20 Staff Representatives who negotiate contracts. In the Buffalo office, contract negotiations are done by Bowie, John Klein, the other Staff Representative, and Deb Hayes, the Area Director. (Tr. 272-73)

As noted above, the CWA represents two groups of employees at Kenmore Mercy Hospital. One group includes the Registered Nurses (“RNs”). The other group contains the Technical employees. (C.P. Ex. 1) The RN contract expires on January 31, 2017. The Technical contract expired on December 15, 2015 (Tr. 35-36; 156-157; C.P. Ex. 1)

CWA and its Local 1133 represent both units at Kenmore Mercy. Erin Bowie, the CWA Staff Representative, represents the two units at Kenmore Mercy and is the chief spokesperson for each unit in contract renewal negotiations. Kathy Kelly is a Vice President of CWA Local 1133 and is a member of the Local 1133 bargaining committee. (Tr. 93, 158, 160, 162, 166-167)

Kenmore Mercy and the CWA started their contract renewal negotiations for the Technical employees unit in early October 2015. (Tr. 110, 320)

As described in detail in Charging Party’s Brief in Opposition to Respondent’s Exceptions to the Judge’s Decision, after the St. Joseph Campus RN contract expired on September 1, 2015 and through March 1, 2016, when the trial ended, the Union refused to bargain more than two days each month. Bowie also unilaterally established a schedule for bargaining that started no earlier than 9:00 a.m. and ended at 5:00 p.m.

In the Kenmore Mercy Technical unit negotiations, the Union adhered to the same tactics and schedule. Thus, Bowie is limiting bargaining to two days each month with the same 9:00 a.m.- 5:00 p.m. schedule. (Tr. 110)

4. The CWA’s July 2015 Handbill

In July 2015, the CWA distributed a handbill, or flyer, at the CHS owned hospitals and posted it on bulletin boards. (Tr. 104-105; C.P. Ex. 1) This handbill listed all of the bargaining units at each of the Catholic Health owned hospitals, along with the contract expiration dates. The handbill also stated:

The Unions that represent workers in the Catholic Health system have been working jointly on a number of issues. One of our primary goals is to have one contract covering all Union employees with Catholic Health with one high standard of wages, benefits and working conditions. The Unions wanted to try and answer some of the most frequently asked questions regarding this issue.

The handbill then provides a number of Q&As, including the following:

3. What is there to gain by bargaining at the same table?

Catholic Health affiliated in 1998 to gain greater operational efficiencies and to better coordinate the delivery of care. Over the years they have taken additional steps to consolidate operations and control what goes on in the various facilities. The Unions should be doing the same thing. We can negotiate a fair, standard set of wages and benefits for all Catholic Health employees, regardless of the facility you work in.

4. How will my contractual rights and bargaining demands be protected?

Every Union and every bargaining unit would have a seat at the bargaining table. Through our system of surveying employees, tabulating results and election of bargaining committee members from the bargaining units, we will guarantee that every voice will be heard and represented at the bargaining table.

5. Is this method for bargaining used in other health systems or hospitals?

Yes, the method described above is utilized in negotiating the Kaleida Health Master Agreement. It's not easy work, but it is a fair process for negotiating a contract that covers employees that work at a number of facilities in a number of different bargaining units.

6. What are the next steps?

We would like all Union employees that support joint bargaining to sign the petition that is being circulated by Chief Stewards, Stewards and Mobilizers. Once we get the required signatures the petition will be presented to Catholic Health accompanied by a Joint Union Proposal on bargaining.

(C.P. Ex. 1)

Thus, as far back as July 2015, the CWA's announced intention was to have "one contract covering all Union employees within Catholic Health." To do so would have required a dramatic

change in the current contract expiration dates in each CWA represented unit, as well as combining the six separate CWA bargaining units into one.

As noted above, the St. Joseph Campus RN contract expired September 1, 2015. The Kenmore Mercy Technical contract expired December 1, 2015. The two contracts for the two units at Mercy Hospital expired on June 4, 2016. As of the close of the hearing, the RN contract and the Kenmore Mercy Technical contract remained open, having expired six months and three months earlier, respectively. The parties had also just started negotiating the two Mercy contracts. It is not difficult to see that the CWA was implementing its plan to have common expiration dates and to combine the bargaining units.

5. Kathy Kelly's Statement

**a. Kelly's Union Position
(Cross-Exceptions 1, 9)**

Kathy Kelly is employed as a Registered Nurse at Mercy Hospital. Kelly is also the Vice President of CWA Local 133. As described earlier, CWA Local 1133 represents employees in four different bargaining units. Two of these bargaining units are at Mercy Hospital and the other two bargaining units are at Kenmore Mercy Hospital. (Tr. 35-36, 156-157; C.P. Ex. 1)

Kelly reports to Deb Arnett, President of Local 1133. Arnett works at Kenmore Mercy Hospital as a Registered Nurse. (Tr. 166-167) In the Local 1133 Vice President position, all of the stewards at Mercy and Kenmore Mercy report to Kelly. The Local's Executive Board also reports to Kelly. (Tr. 158)

As Vice President of Local 1333, Kelly is a member of the CWA bargaining committee for the negotiations at Kenmore Mercy and Mercy hospitals. (Tr. 93, 160, 162)⁴ As such, Kelly

⁴ Kelly is on the CWA Local 1133 bargaining committee for the Kenmore Mercy technical employee negotiations that started in October 2015 and the Mercy negotiations for both the Registered Nurses and the STC unit that start in March 2016. (Tr. 93, 160, 162)

regularly interacts with Bowie, the CWA Staff Representative. Kelly is also responsible for administering the collective bargaining agreements and oversees the grievance procedure. In this function Kelly insures that grievances are timely filed and processed pursuant to the contract. Kelly has the authority to withdraw a grievance if it has no merit. (Tr. 157) If a grievance reaches the third step, Kelly and Arnett jointly decide whether to settle the grievance or appeal it to arbitration. (Tr. 161)

Kelly conducts training of stewards, as well as instructing the stewards on the various contracts. (Tr. 158) Kelly also represents the Union in dealings with either Mercy or Kenmore Mercy and, presents the Union's position to the hospitals. (Tr. 158-159)

Kelly is also responsible for overseeing Local 1133's office. This includes setting up appointments for the Executive Board and appointments with the hospitals. As Local 1133 Vice President, Kelly insures that the Local Union office is properly stocked, purchasing supplies as needed. Kelly has the authority to spend the Union's funds and makes purchases. (Tr. 157-158, 161-162)

**b. Kelly's Conversation with Donna Conti
(Cross-Exceptions 2-5, 7-8, 11)**

Margaret Donofrio is employed as a Nurse Manager for ambulatory surgery, preadmission testing and the perioperative float pool at Kenmore Mercy Hospital. Prior to working at Kenmore Mercy, Donofrio was employed at St. Joseph Campus. She has worked for these two hospitals for 34 years. (Tr. 165-166)

Donna Conti is the former manager of the operating rooms at Kenmore Mercy. Conti is now officially retired but works one or two days a month as a per diem helping out on special projects. (Tr. 166)

Donofrio and Conti have known each other since 1998. They socialize together outside of work. (Tr. 166)

On October 16, 2015, Donofrio and Conti had plans to meet and spend the evening at the Seneca Niagara Casino. They were going to play the slot machines, have dinner and attend a shopping event.⁵

They met in the casino lobby at about 3:40 p.m. and immediately walked over to the slot machines. Donofrio and Conti had their “favorite” slot machines. These particular slot machines were called the China Shores. These were five machines in the middle of a row of 11 slot machines. When they got to these machines, Donofrio sat down at the second China Shores machine and Conti sat at the fourth China Shores slot machine. There was one machine between them but, the machines are very close together and the distance between Donofrio and Conti was only about three feet. (Tr. 168-170) No one else was sitting at the slot machines at the time. (Tr. 170)

Donofrio and Conti began playing their respective machines. They were not talking to each other. A few minutes later Donofrio heard Conti talking to someone. Donofrio turned and saw Kathy Kelly speaking to Conti. (Tr. 171) Kelly was wearing a red CWA issued jacket with a CWA patch on it. (Tr. 177) Kelly was standing directly behind Conti. (Tr. 179)

Conti told Kelly that she had retired and that her mother had passed away. The next comment Donofrio heard was Conti telling Kelly that she did not miss the negotiations or having to negotiate with Deb Arnett.⁶ Kelly replied that if Conti thought Arnett was tough to negotiate with, Conti should negotiate with Kelly. (Tr. 171) At about that time someone else walked up

⁵ This was not unusual. Donofrio and Conti had gone to that casino multiple times together. (Tr. 168)

⁶ As noted above, Arnett is the President of Local 1133 while Kelly is the Vice President. (Tr. 35-36, 156-157, 158, 166-167)

and sat down at the slot machine between Donofrio and Conti. But, that did not stop the conversation between Conti and Kelly. (Tr. 177-178)

Kelly then began talking about the negotiations. Kelly commented that the negotiations at St. Joes⁷ were still going on and that in the spring they would be starting the negotiations as Mercy and at Kaleida.⁸ (Tr. 171-172) Conti interrupted Kelly and said “Kaleida, why do you care about Kaleida, it’s a different system, it’s a different Union local.” (Tr. 172) Kelly responded to Conti that “we’re delaying negotiations because we want to close down the city.” (Tr. 94-95, 172)

Donofrio testified that she was stunned that Kelly would make that statement and say it in such a public place. (Tr. 172-173, 181) Donofrio explained that she had heard the rumors and that it was common knowledge that this was a goal of the CWA. She was just stunned to hear Kelly say it. (Tr. 173, 181)

As Donofrio explained, by delaying the negotiations at the Catholic Health hospitals⁹ and at the Kaleida Health System until those contracts had expired, then the CWA could shut down health care in Buffalo by going on strike, gaining maximum leverage and power. That way, the CWA could get what it wanted. (Tr. 181-182)¹⁰

⁷ A reference to the RN negotiations at St. Joseph Campus.

⁸ Mercy is one of the Catholic Health owned hospitals represented by the CWA. Kaleida Health System is Catholic Health’s major competitor in the Buffalo area. Kaleida is also represented by the CWA. At Kaleida, there is one master agreement covering all locations and bargaining units. (C.P. Ex. 1)

⁹ This would include the RN negotiations at St. Joseph Campus where the contract expired August 31, 2015, the technical employee negotiations at Kenmore Mercy where the contract expired November 30, 2015, the two contracts at Mercy that expire June 3, 2016 and the master contract at Kaleida that expires in June 2016.

¹⁰ Union counsel attempted to downplay this conclusion by pointing out that Kelly is Vice President of CWA Local 1133, while CWA Local 1168 represents employees at St. Joseph Campus and at Kaleida, implying that Kelly could not know what the strategy or agenda would be for Local 1168. What the Respondent Union conveniently ignored is that the CWA represents all of these facilities and Erin Bowie is the Chief Spokesperson for all of these negotiations. So, it would not be surprising at all that Bowie would discuss this strategy with members of her bargaining committees.

Donofrio testified that this area of the casino where these slot machines are is not near the bar and is not loud. Donofrio could clearly hear what Conti and Kelly were saying. (Tr. 179, 181) Neither Donofrio nor Conti had any alcoholic drinks. Donofrio did not see Kelly with any drink. (Tr. 180)

Donofrio described Kelly as serious and that Kelly did not laugh or chuckle when making these remarks. (Tr. 181)

This statement by Kelly was so surprising to Donofrio that when she returned to work the next Monday, she met with Jennifer Jacobs, the HR Manager at Kenmore Mercy and told her what Kelly had said. (Tr. 173-174) In turn, Jacobs informed Tomasello of what Kelly had said. (Tr. 88)

As described earlier, Tomasello was also negotiating the Technical employee contract at Kenmore Mercy. CWA Local 1133 represented those employees. Kathy Kelly is a Vice President of Local 1133 and was on the Union's bargaining committee. (Tr. 92-93) At a Kenmore Mercy negotiation meeting in early January 2016, Tomasello stated that she had made an earlier information request to Bowie regarding the statement that Kelly made in the casino. Tomasello then said that they now had a great opportunity to address this with Kelly present. (Tr. 93)

Deb Hayes, the CWA's District Director for District 1, refused to allow a response and immediately asked for a caucus. About 15 minutes later Hayes called Tomasello and said the Union was prepared to respond. Hayes explained that she had to talk to the Union's attorney to obtain guidance. Hayes then asked Tomasello to tell Kelly what Tomasello had heard that Kelly said. (Tr. 93-94) The following exchange then occurred:

BY MS. PENDER:

Q What did you say to Ms. Hayes and Ms. Kelly, at that time?

A Well, Debbie Hayes was asking me to tell Kathy Kelly what I had heard. So I said to her that what I heard was that she approached one of our managers at the casino and said that the CWA's strategy is to delay reaching an

agreement at St. Joe's, delay reaching an agreement at Kenmore, line up the expired contracts with the Mercy Hospital contracts when they expire, which will also line up with Kaleida, and that they're going to take down the city.

Q Did the Respondent Union respond after you told them what –

A Yes. Debbie turns to Kathy Kelly and said, Kathy, did you make that exact statement. And Kathy said no. And Debbie said, there, I answered your question, we can move on now. And I said, well, we're having a conversation, could she maybe help us understand did she say something like that that and we misunderstood, you know, what was the conversation if that's not what it was.

And Debbie said, no, you're only allowed one question. Our lawyer said that you're not allowed any more than one question, so we've answered your question and we refuse to answer any additional questions. And so we left. Well, I actually said the way you're handling this it's very obvious that you did say something. And she got very upset about that and we left.

MS. PENDER: I have no further questions.

JUDGE DAWSON: Who got very upset?

THE WITNESS: Debbie Hayes did.

(Tr. 94-95)

The Judge cites this exchange in concluding that Kelly denied making the statement. (ALJD 7:33-36, 8:8-9) The Judge erred in doing so. Clearly, the Union was intentionally avoiding the issue and restricting the discussion. Based on Hayes' direction to Kelly, if one word was off in Tomasello's recitation of what Kelly had said, Kelly would have denied that version — which she did. Hayes then refused to allow Tomasello to ask follow-up questions of Kelly. Kelly's "denial" was contrived and disingenuous. The Union never allowed Kelly to reveal what she actually said.

Kathy Kelly was present at the hearing. In fact, Kelly testified about her role with the Union. But, the Union failed to call Kelly as a witness to testify about Kelly's conversation with Conti. In these circumstances, an adverse inference should be drawn against the Union that had

Kelly testified, her testimony would have been consistent with that of Donofrio. *Rocky Mountain Eye Center, P.C.*, 363 N.L.R.B. No. 34 (2015). This is true even though the General Counsel did not call Kelly to testify about that conversation. *Desert Pines Golf Club*, 334 N.L.R.B. 265, 268 (2001); *International Automated Machines, Inc.*, 285 N.L.R.B. 1122, 1122-1123 (1987).

ARGUMENT

I. THE JUDGE ERRED IN FAILING TO CONSIDER KELLY’S STATEMENT

A. UNION VICE-PRESIDENT KELLY’S STATEMENT REVEALS THE CWA’S STRATEGY AND GIVES MEANING AND PURPOSE TO BOWIE’S CONDUCT

At hearing, Margaret Donofrio, a Nurse Manager at Kenmore Mercy Hospital, testified that during a social event at a local Buffalo area casino, CWA Local 1133 Vice-President Kathy Kelly told a retired Kenmore Mercy manager that the CWA’s plan was to delay the negotiations because the Union wanted to close down the city. (Tr. 95, 172) While Kelly’s statements are not necessary to a finding that the Respondent Union violated Sections 8(b)(3) and 8(d), Kelly’s statements do serve to explain and give purpose to Bowie’s refusal to schedule more meetings and present a “take it or leave it” approach on the dates of bargaining meetings as well as the duration of meetings.

1. The Judge Erred in Failing to Find that Union Vice President Kelly is an Agent of the Union (Cross-Exceptions 1, 7-10)

The Judge avoided making a decision on whether Kelly was an agent of the Union, concluding that there was no direct evidence that Kelly was privy to the Union’s negotiating strategy at St. Joseph Campus. (ALJD 8:12-15) In doing so, the Judge erred.

As described in more detail in the Facts, Kelly is a Vice President of CWA Local 1133. Kelly has held that position since early 2015. (Tr. 157, 167) Prior to that, Kelly was an officer of the Union and was a member of the Union’s Executive Board. Kelly assisted the Union in

organizing the employees at Mercy Hospital. As Bowie testified, Kelly “has a lot of Respondent Union experience.” (Tr. 185) Kelly works at Mercy Hospital as a Registered Nurse. (Tr. 166-167)

CWA Local 1133 represents employees in four different bargaining units at Catholic Health hospitals. Two of these bargaining units are at Mercy Hospital and the other two bargaining units are at Kenmore Mercy Hospital. (Tr. 35-36, 156-157; C.P. Ex. 1)

Kelly reports to Deb Arnett, President of Local 1133. Arnett works at Kenmore Mercy Hospital as a Registered Nurse. (Tr. 166-167) In the Local 1133 Vice President position, all of the stewards at Mercy and Kenmore Mercy report to Kelly. The Local 1133 Executive Board also reports to Kelly. (Tr. 158)

As Vice President of Local 1133, Kelly’s duties and responsibilities include the following:

- Member of the CWA bargaining committee for the negotiations at both Kenmore Mercy and Mercy hospitals. (Tr. 93, 160-162)¹¹ In this role, Kelly has regular contact with Bowie, the CWA’s Staff Representative.
- Administering the four collective bargaining agreements at Kenmore Mercy and Mercy hospitals. (Tr. 157)
- Overseeing the grievance procedure for these four contracts, insuring that grievances are timely filed and processed. Withdrawing grievances that have no merit. (Tr. 157)
- Along with Local 1133 President Arnett, jointly decide whether to settle a grievance or appeal to arbitration. (Tr. 161)
- Trains stewards. Provides instruction to stewards on the applicable contracts. (Tr. 158)
- Represents the CWA in meetings with either Kenmore Mercy or Mercy management. Presents the Union’s position to the representatives of Kenmore Mercy and Mercy. (Tr. 158-159)

¹¹ The contract renewal negotiations for the technical employees at Kenmore Mercy started in October 2015. That contract expired November 30, 2015. The contract renewal negotiations for the Registered Nurse unit and the Service, Technical, Clerical unit at Mercy Hospital started in March 2016 and those two contracts will expire on June 3, 2016. (Tr. 83-84, 93, 101, 110, 160, 162, 320)

- Manages the Local 1133 office. (Tr. 157-158)
- Purchases supplies and otherwise spend Union funds. (Tr. 161-162)

Based on Kelly's undisputed duties and responsibilities as Vice President of CWA Local 1133, Kelly is an agent of not only Local 1133 but also the CWA. *Independent Dock Workers Union, Local 1*, 330 NLRB 1348 (2000); *Marlin Rockwell Corporation*, 114 NLRB 553 (1955); *Peerless Quarries, Inc.*, 92 NLRB 1194 (1951).

The Judge concluded that Kelly was Vice President of CWA Local 1133 and did not participate in the negotiations at St. Joseph Campus, which involved CWA Local 1168. (ALJD 8:12-17) That is a distinction without a difference.

Just because Kelly is an official of CWA Local 1133 does not mean that she would not be aware of the CWA's strategy as it affected both CWA Local 1168 and CWA Local 1133. The CWA represents employees at St. Joseph Campus, Kenmore Mercy and Mercy Hospital as well as employees at the Kaleida Health System Hospitals. The common thread being that Bowie is negotiating all of these contracts. Since Bowie is the Chief Spokesperson in these negotiations it would be expected that Bowie would discuss strategy with her respective bargaining committees. What Bowie did not count on was Kelly repeating that strategy in a public place.

As described in the Facts, Bowie was conducting negotiations for the Kenmore Mercy Technical unit in an identical manner to how she was conducting negotiations in the St. Joseph Campus RN unit. That is, meeting only two days each month and unilaterally setting the schedule to end the negotiations at 5:00 p.m. on those days. (Tr. 110) While there is no obvious "smoking gun," it is extremely naïve to conclude that the CWA's Staff Representative Bowie would not share the Union's objectives and strategy with her bargaining teams. This is particularly true based on the evidence here:

- Union handbill announcing that Union's objective is to have one contract covering all represented employees at all of the Catholic Health owned hospitals;
- Expiration of the St. Joseph RN contract;
- Limiting the negotiations in those RN negotiations to two days each month;
- Expiration of the Kenmore Mercy Technical contract;
- Limiting the negotiations in those Technical negotiations to two days each month.

It is entirely reasonable to conclude that the Local 1133 bargaining committee at Kenmore Mercy would have asked Bowie why the Union was only scheduling two bargaining days each month rather than trying to reach an agreement prior to expiration. To keep her bargaining committee "in line," it is also reasonable to conclude that Bowie would have explained the Union's strategy. It is unreasonable to conclude that the Local 1133 bargaining committee members (or the Local 1168 bargaining committee members) would sit quietly and say nothing when it was clear that an agreement would not be reached prior to the contract expiration. It is unreasonable to conclude that the Local 1133 bargaining committee members would not ask why Bowie would not schedule more than two days each month for bargaining. The Judge erred by ignoring the record evidence and assuming that Kelly did not have any information or knowledge of the Union's bargaining strategy.

2. The Judge Erred by Failing to Find that CWA Local 1133 Vice President Kelly Admitted that the CWA's Strategy Was to Delay the Negotiations (Cross-Exceptions 2, 4, 7-11)

On October 16, 2015, Margaret Donofrio, a Nurse Manager at Kenmore Mercy, met Donna Conti, a retired manager from Kenmore Mercy, at the Seneca Niagara Casino for an evening of gambling, dining and shopping. Donofrio and Conti were good friends and socialized regularly. (Tr. 168-170)

Upon arriving at the casino, they immediately walked to their favorite slot machines. They each sat at a slot machine, and were seated about three feet apart. (Tr. 168-170)

Donofrio and Conti began playing on their respective machines. There was no conversation between them. A few minutes after they started playing, Donofrio heard Conti talking to someone. Donofrio turned to look at Conti and saw Kathy Kelly speaking to Conti. (Tr. 171) Kelly was wearing a red CWA issued jacket with a CWA patch on it. (Tr. 177) Kelly was standing directly behind Conti. (Tr. 179)

Conti and Kelly clearly knew each other. Conti told Kelly that she had retired and that her mother had recently passed away. Conti told Kelly that she did not miss the negotiations or having to negotiate with Deb Arnett. Kelly replied that if Conti thought Arnett was tough to negotiate with, Conti should negotiate with Kelly. (Tr. 171) Someone else then walked up and sat down at the slot machine between Donofrio and Conti. That person's presence did not impact or stifle the conversation between Conti and Kelly. (Tr. 177-178)

Kelly then began telling Conti about the negotiations. Kelly stated that the negotiations at the St. Joseph hospital were still going on and that in the spring they would be starting the negotiations at Mercy and at Kaleida.¹² (Tr. 171-172) Conti interrupted Kelly and asked Conti "Kaleida, why do you care about Kaleida, it's a different system, it's a different Union local." (Tr. 172) Kelly responded to Conti that "we're delaying negotiations because we want to close down the city." (Tr. 172)

Donofrio was stunned not only that Kelly would make such a statement but, also that Kelly said it openly, in a public place without regard to who was in the vicinity. (Tr. 172-173, 181) As Donofrio testified, Kelly was not joking when she made this statement. Kelly was serious and did

¹² These statements by Kelly prove that she did have knowledge about the RN negotiations at St. Joseph Campus.

not laugh or chuckle. (Tr. 181) Donofrio also made it clear that she did not misunderstand Kelly and could easily hear what Kelly and Conti said. (Tr. 179, 181)

The significance of Kelly's statement was not lost on Donofrio. The CWA was then engaged in negotiations at St. Joseph Campus for the RNs and at Kenmore Mercy for the technical employees. Negotiations would start at Mercy hospital for the RN unit and the STC unit in March 2016. The negotiations at Kaleida Health System for its master agreement would also start in March 2016. The Mercy and Kaleida contracts expire in June 2016. Bowie is the chief spokesperson at all of these negotiations. If the CWA could push out the bargaining at St. Joseph Campus and Kenmore Mercy until June 2016, then the CWA could actually shut down the provision of healthcare in the Buffalo metropolitan area by engaging in a strike at St. Joseph Campus, Kenmore Mercy, Mercy and the multiple Kaleida hospitals. Such a citywide strike would give the CWA substantial leverage in all of these negotiations. (Tr. 95, 172, 181-182)

Donofrio informed Jennifer Jacobs, the HR Manager at Kenmore Mercy, what Kelly had said. Jacobs then told Tomasello. (Tr. 88, 173-174)

**3. The Judge Erred by Concluding that Kelly Denied Stating that the Union was Delaying Negotiations
(Cross Exceptions 3, 5)**

In January 2016, during a bargaining session in the Kenmore Mercy negotiations, Tomasello asked Kelly what she had said. Deb Hayes¹³ refused to allow Kelly to answer and took an immediate caucus to call the Union's attorney. After receiving instruction from their attorney, the Union called the Hospital back to the room. (Tr. 92-94)

At that point, a farcical exchange took place between Tomasello, Hayes and Kelly. As Tomasello explained in her testimony:

¹³ Bowie was in the midst of a six week vacation to Burma and Hayes was filling in for her.

BY MS. PENDER:

Q What did you say to Ms. Hayes and Ms. Kelly, at that time?

A Well, Debbie Hayes was asking me to tell Kathy Kelly what I had heard. So I said to her that what I heard was that she approached one of our managers at the casino and said that the CWA's strategy is to delay reaching an agreement at St. Joe's, delay reaching an agreement at Kenmore, line up the expired contracts with the Mercy Hospital contracts when they expire, which will also line up with Kaleida, and that they're going to take down the city.

Q Did the Respondent Union respond after you told them what –

A Yes. Debbie turns to Kathy Kelly and said, Kathy, did you make that exact statement. And Kathy said no. And Debbie said, there, I answered your question, we can move on now. And I said, well, we're having a conversation, could she maybe help us understand did she say something like that that and we misunderstood, you know, what was the conversation if that's not what it was.

And Debbie said, no, you're only allowed one question. Our lawyer said that you're not allowed any more than one question, so we've answered your question and we refuse to answer any additional questions. And so we left. Well, I actually said the way you're handling this it's very obvious that you did say something. And she got very upset about that and we left.

MS. PENDER: I have no further questions.

JUDGE DAWSON: Who got very upset?

THE WITNESS: Debbie Hayes did.

(Tr. 94-95)

That ended the discussion. Kelly did not make the broad denial found by the Judge. Based on Hayes' direction, after having talking with the Union's attorney and receiving instructions on what to do, Kelly only denied making that "exact statement" as recited by Tomasello. Kelly was not allowed to explain what she did say and Tomasello was not allowed to ask Kelly any follow-up questions. Clearly, the Union was intent in not allowing Kelly to explain what she actually said. Obviously, Kelly did tell Conti on October 16, 2015 that the Union's plan was to delay the negotiations at St. Joseph Campus and Kenmore Mercy and the Union now knew that Kelly's

statements would be the “smoking gun” evidence that the Union was violating the law. Hayes’ failure to allow Kelly to respond to Tomasello’s question is no different than the Union’s failure to call Kelly as a witness at the hearing. The Union simply does not want Kelly to tell the truth. The Judge erred in concluding that Kelly denied stating that the Union was delaying negotiations.

4. The Judge Erred in Failing to Draw an Adverse Inference That If the Union Had Called Kelly to Testify, She Would Have Corroborated Donofrio (Cross Exception 6)

The Union had Kelly in the Region 3 office on February 29. Kelly’s presence resulted in her being called to testify by the General Counsel during the trial about her duties and responsibilities as Vice President of Local 1133. (Tr. 156-163) Donofrio testified about Kelly’s statements at the casino on February 29. Despite Kelly’s status as an agent of the Union and her being present, the Union failed to call Kelly as a witness regarding Donofrio’s testimony that Kelly said the Union was delaying negotiations so that it could shut down the city. *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34 (2015); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); *Classic Sofa, Inc.*, 346 NLRB 219 (2006); *Hialeah Hospital*, 343 NLRB 391, 393 at fn. 20 (2004).

Drawing the adverse inference remains the standard applied by the Board even though the General Counsel and Charging Party did not call Kelly to testify about her statements to Conti. *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001). As the Board concluded in *International Automated Machines*, 285 NLRB 1122 (1987),

The Respondent relies on *Wayne Construction*, 259 NLRB 571 fn. 1 (1981), where the Board, in dictum, stated that there was no basis for drawing an adverse inference against the Respondent for failing to call its co-owner to corroborate its project superintendent’s testimony. Whatever the merits of the Board’s failure to draw an adverse inference in *Wayne Construction* – a failure that did not affect the outcome of the case – we reject the reason assigned there, which was that the co-owner was equally available to be called by both *1123 the Respondent and the General Counsel.⁵ That rationale conflicts with the familiar rule, accepted by the Board,

that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. 2 Wigmore, *Evidence*, § 286 (2d ed. 1940); McCormick, *Evidence*, § 272 (3d ed. 1984). See *Greg Construction Co.*, 277 NLRB 1411 (1985); *Hadbar*, 211 NLRB 333, 337 (1974). In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. *Ibid.* Thus, while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management, and it supports the judge's findings on the issues on which Davis' testimony would have been probative.

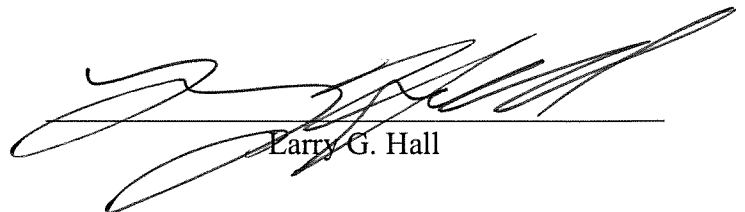
285 NLRB 15 1122-1123.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the Charging Party, Sisters of Charity Hospital of Buffalo, New York, St. Joseph Campus, respectfully submits that the Judge erred in not finding that CWA Local 1133 Vice President Kelly stated that the Union was delaying negotiations because the Union wanted to close down the city.

Dated: August 11, 2016

Respectfully submitted,



Larry G. Hall

FORDHARRISON LLP
55 East Monroe Street
Suite 2900
Chicago, IL 60603
(312)332-0777 — Telephone
(312) 332-6130 — Facsimile
lhall@fordharrison.com


CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that that a copy of the foregoing **Charging Party's Brief in Support of Cross-Exceptions to Decision of Administrative Law Judge Donna Dawson** was served upon the following parties:

Catherine Creighton, Esq.
Creighton, Johnsen & Giroux
560 Ellicott Square Building
295 Main Street, Suite 560
Buffalo, NY 14203
ccreighton@cpjglaborlaw.com
Union Attorney

Alicia Pender, Esq.
Eric Duryea, Esq.
National Labor Relations Board, Region 3
Niagara Center Building, Suite 630
130 South Elmwood Avenue
Buffalo, NY 14202
alicia.pender@NLRB.gov
eric.duryea@NLRB.gov
NLRB General Counsel

by email transmission to the email addresses indicated above and by enclosing a true and correct copy of same in a Federal Express envelope and shipping via Federal Express delivery to the addresses indicated above on the 11th day of August, 2016.



Larry G. Hall

FORDHARRISON LLP
55 East Monroe Street
Suite 2900
Chicago, IL 60603